

SERVICE DATE - LATE RELEASE MARCH 4, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42069

DUKE ENERGY CORPORATION

v.

NORFOLK SOUTHERN RAILWAY COMPANY

MOTION TO COMPEL DISCOVERY

Decided: March 1, 2002

By complaint filed and served on defendant Norfolk Southern Railway Company (NS) on December 19, 2001, Duke Energy Corporation (Duke Energy) alleges that the rates to be assessed on the movement of coal from origins in Virginia, West Virginia, and Kentucky, to Duke Energy's Allen, Belews Creek, Buck, and Dan River electric generating facilities, located, respectively, at Belmont, Walnut Cove, Spencer, and Eden, NC, will exceed a maximum reasonable level.¹ Duke Energy alleges that NS possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed along with other relief. Duke Energy also requests an award of reparations. NS answered the complaint on January 8, 2002.

On February 5, 2002, Duke Energy filed a motion to compel responses to its discovery Request No. 44 seeking production of all NS coal transportation contracts and tariffs governing shipments (made in the year 2001 or thereafter) traversing a portion of the route used for the NS movements to Duke Energy's aforementioned electric generating facilities. Duke Energy submits that the request was intended to obtain information relevant to the traffic group for its stand-alone railroad (SARR), and to provide information regarding the future traffic and revenue for that SARR. According to Duke Energy, NS, in its responses to discovery dated January 28, 2002, objected to producing any documents relating to Request No. 44, with the caveat that it would not object to entry of an order by the Board compelling it to produce the contracts subject to conditions that would: (1) require prior notice to affected shippers and afford them an opportunity to object to production; and (2) treat the contracts as highly confidential as outlined in the protective order issued in this proceeding in a decision served on February 5, 2002.

¹ NS's service was formerly provided under a rail transportation contract that terminated on December 31, 2001. Because the parties could not reach a satisfactory replacement agreement, Duke Energy asked NS to establish applicable common carrier rates under 49 U.S.C. 11101 and 49 CFR 1300. On November 19, 2001, NS established common carriage rates and service terms covering these movements, effective January 1, 2002.

Duke Energy argues that the Board has consistently held that rail transportation contracts to which the defendant is a party are highly relevant to the determination of an appropriate SARR traffic group and its associated volumes and revenues. Although the parties apparently agree that such contracts can be produced subject to a Board order compelling production, Duke Energy objects to a condition that would delay the proceeding to allow the affected shippers time to object. Given that its document requests were served on NS on December 27, 2001, Duke Energy submits that NS has had ample opportunity to notify affected shippers. Moreover, Duke Energy argues that the Board has consistently found that the existence of a protective order will satisfy all confidentiality concerns of the nature raised by NS.

In its reply to the motion to compel, filed on February 11, 2002, NS submits that some of its coal transportation contracts require that it notify affected shippers of any effort by a third party to compel disclosure of their contracts. NS states that it has identified all relevant contracts in response to discovery Request No. 44, and has given the affected coal shippers notice of Duke Energy's motion to compel. NS notes that protective orders do not necessarily assuage the confidentiality concerns of affected coal shippers and, therefore, these shippers should be given an opportunity to express their views to the Board before production of their contracts is compelled. Thus, NS proposes that the Board reserve ruling on the motion to compel for a period of 20 days to enable affected shippers to present their objections (if any) to the Board.²

It is well settled that a protective order ensures that confidential, proprietary, or commercially sensitive information will be used solely for the involved proceeding and not for other purposes. See Pennsylvania Power & Light Company v. Consolidated Rail Corporation, CSX Transportation, Inc., and Norfolk Southern Railway Company, STB Docket No. 41295 (STB served Mar. 10, 1997) (Pennsylvania Power). In Pennsylvania Power, a request to delay action on the motion to compel production of transportation contracts to afford affected shippers an opportunity to object to disclosure was denied on the basis that shippers who are apprehensive regarding disclosure of extremely sensitive materials can allay their fear by expressing their concern to the defendant, who, with the complainant, can determine what level of confidentiality should be assigned to the material produced. Pennsylvania Power, slip op. at 2.

² By letter filed on February 25, 2002, Southern Company Services, Inc., agent for Alabama Power Company, Georgia Power Company, Savannah Electric and Power Company, Mississippi Power Company, and Gulf Power Company (collectively, Southern), objects to the disclosure of its transportation contracts to Duke Energy. Southern fears damage to its competitive position in the electric wholesale market because Duke Energy is a direct competitor.

Here, NS has not presented any additional argument that would warrant a change in the Board's policy regarding production of transportation contracts.³ Under the circumstances, there is no valid reason to delay action on the motion to compel. Accordingly, Duke Energy's motion to compel production of the requested rail transportation contracts, subject to the "Highly Confidential" provisions of the protective order issued in this proceeding on February 5, 2002, will be granted.

It is ordered:

1. Duke Energy's motion to compel discovery of rail transportation contracts is granted, as specified above.

2. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

³ NS argues that Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42056 (STB served Feb. 9, 2001) (Texas Municipal), a case cited by Duke Energy in support of its position, is not inconsistent with NS's request. On the contrary, the Board's comments in that proceeding addressing shipper objections received prior to the issuance of the decision, are in line with the policy expressed in Pennsylvania Power, i.e., "While we understand the concerns raised by those shippers here, we are satisfied that the parties' agreements regarding scope and the application of the 'highly confidential' provisions of the protective order are sufficient to protect the interests of third-party shippers." Texas Municipal, slip op. at 2-3.